Filed 4/23/12 In re Holly R. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re HOLLY R., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. G.W. et al., Defendants and Appellants.	G045747 (Super. Ct. No. DP011402) O P I N I O N

Appeal from orders of the Superior Court of Orange County, Dennis J. Keough, Judge. Affirmed.

Patricia K. Saucier, under appointment by the Court of Appeal, for Defendant and Appellant G.W.

Merritt L. McKeon for Defendants and Appellants M.K. and J.K.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

G.W. (father) appeals from the termination of his parental rights to his now almost seven-and-a-half-year-old daughter, Holly H. (child), who suffers from Down's Syndrome. He contends the court erred in denying his petition for modification under Welfare and Institutions Code section 388 (all further statutory references are to this code), finding the benefit exception under section 366.26, subdivision (c)(1)(B)(i) inapplicable, and failing to consider the child's wishes before terminating his parental rights. Maternal relatives M.K. (grandmother) and J.K. (aunt) appeal from the same order, echoing father's argument about the child's wishes and further asserting the court should have granted them de facto parent status earlier than it did. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

The child was declared a dependent in February 2005 when she was six months old due to mother's substance abuse problems. Mother (not a party to this appeal) initially would not provide father's name "because he refused to be involved . . . after learning of [the child's] disability." She subsequently identified father, who told the social worker "he did not desire to become involved in the [j]uvenile [c]ourt process . . . ." Mother regained custody of the child and those dependency proceedings terminated in February 2007.

The child was again taken into protective custody in July 2008 after she was found alone in a busy intersection with a soiled diaper. Upon being arrested for child endangerment, mother stated she did not know father's whereabouts. Orange County Social Services Agency (SSA) placed the child with maternal relatives. The court ordered the child detained, supervised visitation for both parents, and no change in placement pending the next hearing.

For the jurisdiction and disposition hearing in September, SSA reported father stated he wanted to be involved in the child's life but had an inflexible work schedule and other children. When he and mother were together during their five-year on and off again relationship, father saw the child three times a week but otherwise did not see her often. He believed he did not need services because he had no issues to address and questioned why he had to drug test since he did not have substance abuse problems.

The court sustained the amended jurisdictional petition, granted both parents visitation and reunification services, and struck the required drug testing for father but still required him to participate in a 12-step program. The child remained placed with maternal relatives over mother's objection.

In October, maternal relatives reported father had not visited the child recently, had minimal contact with her, did not understand her needs, and had a drinking problem. Father wanted mother to reunify with the child but was willing to care for her if that was not possible. There were "no reported concerns" regarding father's visits, although he missed a few in October and November.

Early the next year, maternal relatives filed for de facto parent status. The court denied the request without prejudice but ordered they be provided with the child's medical information.

For the six-month review, SSA described the child as a sweet four-year-old who "does not speak much but does say a few words," "appears to understand simple instructions," and "shows her emotions usually non-verbally . . . ." She had adjusted well to living with maternal relatives, who had an assistant caring for her. Nevertheless, SSA had "some concerns with" their "ability to properly care for the child for an extended/long term period of time."

Father made substantial progress on his case plan, completing his parent education classes, participating in a drug program, progressing to unmonitored visitation, and showing improved commitment to reunification with the child, which had

"appear[ed] low at times." He was interested in overnight and 60-day trial visits but declined to attend a parent education course specifically for parents with children who have Down's Syndrome. The court extended reunification services to the 12-month review hearing, allowed father to stop attending the drug program and authorized overnight visits once a week for each parent.

The child's status with maternal relatives remained unchanged for the 12-month review hearing. She was still "primarily nonverbal but communicate[d] through gestures," was not toilet trailed, and required assistance performing daily tasks.

Father had four overnight visits in March 2009, during which he allowed mother to stay overnight without authorization. By late April, the parents, who had gotten together and broken up again several times, were no longer on speaking terms. Father told SSA he was finished dealing with mother even if it meant losing his rights to the child. He was not interested in further visitation and "was 'walking away'" due to harassment by mother, against whom he had unsuccessfully tried to obtain a restraining order.

In November, maternal relatives filed a second motion for de facto parent standing. The court denied the motion, finding it raised "a significant question" regarding maternal relatives' commitment to the parental reunification process and that the child's primary psychological bond was with mother. At the 12-month review hearing, the court terminated father's reunification services, placed the child with mother under supervision, and allowed grandmother visitation with mother's agreement as to scheduling.

A supplemental petition filed in May 2010 alleged mother had driven under the influence while the child was in the car with her and that the child was late to school 56 out of 115 school days. The court ordered the child detained and placed at SSA's discretion. SSA initially placed the child with maternal relatives but removed her because such placement was opposed by the child's counsel and mother, the child's

health had declined during the prior placement with them, and grandmother was "likely to greatly interfere with this case if the child [was] placed with her regardless the outcome of the case."

Maternal relatives moved to join the dependency proceedings. In a supporting declaration, grandmother attested the child, now five, had lived with her for most of her life and that during the initial dependency proceeding in 2005 and 2006 "father never visited once and would not even admit he was the biological father of [the child]." Additionally, mother had threatened to kill herself at the beginning of 2010. Accordingly, grandmother claimed the child "needs to be with me" because she was "a special needs child" who "cannot feed herself, cannot communicate and has problems swallowing due to her condition." The court denied the motion.

For the jurisdictional and dispositional hearing, SSA was unable to interview the child "due to her lack of communication skills." Although she was able to use "simple words, gestures, and some sign language," it was "in too limited a manner to participate in an interview."

Mother told SSA father remained in contact with her and knew of the circumstances but SSA was unable to interview him despite its attempts; father did not visit the child or request to do so. SSA recommended reunification services be denied to both parents. Grandmother was authorized once-a-month monitored visitation.

In mid-June, the court sustained the amended supplemental petition and set a dispositional hearing. A week later, maternal relatives filed a section 388 petition requesting the child's placement and de facto parent status. SSA recommended denying the petition because during the 19 months while in their care the child had suffered numerous medical problems and severe tooth decay requiring the removal of 13 teeth, they appeared unable to attend to the child's needs without assistance from mother who did not want the child placed with them, and they would likely interfere with family reunification. Additionally, the child had not been potty-trained, had tantrums and a

limited vocabulary, and was not engaged in school. By contrast, in the single month the child had been placed with the caretakers, she was healthy, more active and social at school as well as more verbal and independent in her eating and bathing, progressing in her toilet training, and had shorter and fewer tantrums. Maternal relatives withdrew their petition.

The child's placement changed a few times until placed with her current caretaker, who had "a 'special connection'" to the child having cared for her for about a month after birth while mother was incarcerated. The caretaker's home met state approval standards despite having initially sought to cancel the home assessment out of concern about mother being "'hostile'" and grandmother "'caus[ing] havoc.'" Although the caretaker had prior misdemeanor drug convictions, she received the necessary exemption and was approved for placement. She had "limited experience, knowledge and training in caring for children with special needs and challenges" but was "willing to be trained and to do whatever was necessary to meet [the child's] needs" and "transport [her] to all necessary appointments and visitation."

The next month, father contacted SSA to request visitation, stating he had heard "'things had gotten bad' and 'it was time to get involved I guess.'" He denied receiving notification of court hearings after the child was removed from mother's care in May, but provided the same address SSA had on file. Following a contested hearing, the court found it would be detrimental to return the child to parents, denied them reunification services, and set a section 366.26 hearing.

Maternal relatives filed a section 388 petition and request for de facto parent standing, seeking placement of the child. The supporting points and authorities noted the child "is essentially non-verbal" but claimed it was clear she wanted to be placed with them because she said to grandmother at visits, "Bye, bye. Your house." Although the court initially denied the petition outright, it later ordered a hearing to determine whether a prima face case had been made. It subsequently granted them de

facto parent standing request but found their showing insufficient to change the child's placement.

In the report prepared for the section 366.26 hearing, SSA indicated the child appeared "to understand most of what she is told and can follow simple instructions when she feels like it." Nevertheless, the child had limited verbal skills and was difficult to understand, communicating primarily through sign language or gestures.

Father filed a section 388 petition for a placement change, alleging the child was at risk based on concerns cited in SSA's report about the caretaker. He also cited his four-hour monitored visits with the child during which they read, played, and laughed together, and "constantly hug, kiss, and express 'I love you.'" The court granted father a hearing, to be held in conjunction with the section 366.26 hearing.

Father's weekly four-hour monitored visits with the child, spread over 3 days, went well overall aside from a few inappropriate comments. He hugged and kissed the child, carried her on his shoulders, and was attentive, often playing and interacting with the child, as well as bringing food. The child had no problem saying good-bye when visits ended. A visit by maternal relatives "did not go well" and ended early because they could not engage the child. Mother stopped visiting the child and was reported to be hospitalized in a mental institution for suicidal ideations.

At the combined sections 366.26 and 388 hearing, the social worker for the majority of the case testified she opposed placement with father because he failed to reunify with or have a consistent relationship with the child having "stepped away from the case" for a lengthy period, did not show he had the ability to care for her medical needs alone without dependence on mother, and allowed mother unauthorized visits. Although father's current visits were regular and consistent, he had not requested additional visitation beyond the four hours of weekly supervised visitation he had been receiving for the better part of a year. Nor did he bring diapers and wipes or other items, which would have shown he was interested in caring for the child during visits.

When the child was placed with maternal relatives, the social worker went to their home once a month where she observed the nanny "at least 95 percent of the time" performing most of the childcare duties. Between July 2008 and September 2009, they transported the child to several dental appointments scheduled by mother and paid for her dental bridge. At the same time, they deferred questions about the child's medical care to mother and "weren't well versed in what she needed for her care."

The social worker had some concern about the caretaker's commitment to adoption because she was willing to step aside if there was a better placement for the child but other than that did not waver from her willingness to adopt. Additionally, two other families were interested in adopting the child and there was no reason to believe she would be difficult to place for adoption. Her primary need was stability, which neither of her parents had been able to provide. Although maternal relatives were able to do so when the child was placed with them, they were not forthcoming about allowing parents to have unauthorized visits, which was "destabilizing" for a child.

Father testified he had stepped away from the case for about a year beginning in mid-2009 but he still had "little visits" about once a month when mother brought her over to his apartment. He assured the court he was not going to step away again by noting his regular visitation in the past year after he "found out about this whole mess last July," missing only two visits because of an illness and a court appearance in the present case. Although he admitted allowing mother unauthorized visits when he had overnight visits with the child, he "most definitely" would not let her do so again, as he had learned his lesson and was "not going to play Russian roulette like that again." He understood and could take care of the child's special needs, despite working full time and mother not living with him. He did not know support groups were available for parents of children with Down's Syndrome.

When mother was pregnant with the child father was at her place "quite a bit," but he had to be informed by the child's nanny mother had given birth and was in

jail. He did not attempt to seek custody at that time because he did not believe he would "get a fair shake" and he did not know what steps to take. The "several [uphill custody] battles" involving his three other children had left him mentally and physically tired and he could not afford an attorney. Father thought he had declared his paternity despite not being on the child's birth certificate and not completing a DNA test until 2008. He did not request a status report during the first dependency and there was no court-ordered visitation but he did not recall stating he did not want to be involved.

After the child was born, father had ongoing contact with her at least once a month, sometimes more, with him playing a parental role. During his current monitored visitation, the child called him "papa" and parted with him affectionately when visits ended. The child expressed wanting to go home with him several times. He did not request to increase his visitation because SSA told him that was all the court would permit. He admitted not taking the child to any medical or dental appointments during the current proceedings and not knowing the child was in SSA custody from April to July 2010.

The visitation monitor confirmed father consistently visited the child, who called him "papa" and ran to him at the beginning of visits. The child asked for father when he missed a visit. If she was running from mother, the child would calm down when father arrived. Father would discipline the child by asking her to stop doing something, teach her about different countries and animals, and bring toys and food to visits. Occasionally, he would carry her and she would wrap her arms and legs around him. He would also pull her closer and put his arms around her if she told him she was cold, consistently demonstrated a parental role toward her during the hour-long visits, showed knowledge of her development, and responded appropriately to her verbal and nonverbal signals. Although the visits were a positive experience for the child, which ended with father and child rubbing their noses together (Eskimo kisses), the child had no

difficulty separating from him at the end of visits and went easily to the monitor. Visits were "usually the same every time, go to the park, . . . play on the playground."

Grandmother testified she and aunt took care of the child without a nanny for the first 20 months after the then four-month-old was placed with them in October 2005. During that time, grandmother allowed father to see the child two to three times a week, but never told SSA because she was not asked. Father consistently visited the child and gave her things. Maternal relatives hired a nanny when the child was placed with them again in 2008.

Describing her most recent visit, grandmother stated the child hugged her, called her "Amma" and said, "Your house, your house." Grandmother acknowledged the child did not have a full vocabulary and only used certain words. She believed it was in the child's best interest to have visitation with her and aunt, as she was "very bonded" to them.

Following extensive argument, the trial court found father and grandmother not credible and denied father's section 388 petition. Although father's recent visitation was "essentially perfect," it was insufficient when compared to his sporadic history to demonstrate either a change in circumstances that he had a present commitment to provide long-term care for the child or that placement in his care would be in her best interest. The court was concerned about father's "lack of fierceness" in his long-term commitment to the child and his failure to request to move beyond monitored visitation. It stated it might have ruled otherwise had father's testimony had been consistent with his section 388 affidavit acknowledging his mistakes and asserting the future would be different, but found he had not been candid in his testimony about his relationship with the child and his motivations, instead amplifying the visitation beyond that established by the record. It concluded father's recent consistent visitation was insufficient by itself to demonstrate either a change in circumstances that he had a present commitment to

provide long-term care for the child or that placement in his care would be in her best interest.

Regarding section 366.26 issues, the court determined by clear and convincing evidence neither the sibling nor benefit exceptions applied. As to the latter, it found parents had met the visitation prong but had not shown maintaining the parental relationship outweighed the child's interest in permanency. It terminated parental rights and the de facto status of grandmother and aunt after "necessarily den[ying]" their section 388 petition. It concluded its findings by stating it had "specifically considered the wishes of the child consistent with the child's age, and all findings and orders are made in the best interests of the child."

DISCUSSION

1. Father's Section 388 Petition

Father argues the juvenile court erred in denying his section 388 petition. We disagree.

Under section 388, subdivision (a) "[a]ny parent . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made . . . ." To obtain the requested modification, the parent must demonstrate both a change of circumstance or new evidence, and that the proposed change is in the best interests of the child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "The change of circumstances or new evidence 'must be of such significant nature that it requires a setting aside or modification of the challenged prior order.' [Citation.]" (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.)

The parent bears the burden of proving the requested modification should be granted. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We review a juvenile court's

determination on a petition brought under section 388 under the abuse of discretion standard. (*Id*. at p. 318.)

Father contends his "'essentially perfect' visitation" constituted changed circumstances. But he has not explained how that, alone, is "'of such significant nature'" as to require a modification of the prior order. (*In re Mickel O., supra,* 197 Cal.App.4th at p. 615.) At this point in the proceedings after reunification services have been terminated, the focus of dependency proceedings shifts from efforts toward family reunification to providing the child with permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Father's visitation did not show he could do that. His visits for the past year did not progress beyond four supervised hours a week and he never asked for more. During the visits, which were the same every week and consisted of going to the park and playing on the playground, father had fun with and read to the child, brought food, and expressed affection but did not otherwise demonstrate interest in caring for the child by bringing diapers, wipes or other items to visits. He had progressed beyond this point once before to overnight visits in the prior dependency proceeding but then stopped participating in the case altogether shortly after because he did not want to deal with mother even if it meant he lost his rights to the child. The child had been a dependent for much of her life and father had never parented her full time. On this record, the court did not abuse its discretion in concluding father's recently consistent visitation insufficient by itself to grant the requested modification and it is unnecessary to address father's arguments regarding the child's best interests.

2. Benefit Exception

Once the court determines under section 366.26 a child is likely to be adopted, it "shall terminate parental rights" (§ 366.26, subd. (c)(1)) and order the child placed for adoption unless it "finds a compelling reason for determining that termination would be detrimental to the child" because of one of the statutory exceptions. (§ 366.26,

subd. (c)(1)(B).) One exception is where a "parent[] ha[s] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent has the burden of proving both factors and that he "occupie[d] a 'parental role' in the child's life. [Citations.]" (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

Father contends the court erred in terminating his parental rights because he met this exception. County Counsel concedes father's visitation for the past year was consistent but argues he did not satisfy the second factor. We agree.

Where a parent has continued to regularly visit and contact the child, and the child has maintained or developed a significant, positive attachment to the parent, "the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "A beneficial relationship is one that 'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' [Citation.] The existence of this relationship is determined by '[t]he age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's particular needs . . . . [Citation.]" (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.)

Here, the child was almost seven years old at the time of the permanency hearing and had spent no portion of her life in father's custody. Father's interaction with the child over the past year never progressed beyond four hours a week of monitored visitation spread over 3 days. (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523, disapproved of on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 414 [showing

required for benefit exception "'difficult to make . . . where . . . parents have . . . [not] advanced beyond supervised visitation'"].) According to the visitation monitor, the visits were the same every week with father and child "go[ing] to the park . . . [and] play[ing] on the playground." Although the hour-long visits were pleasant and affectionate, with father playing with, occasionally disciplining, and teaching the child basic things, as well as demonstrating a parental role and having knowledge of the child's development, the child had no difficulty separating from him when visits ended and went easily to the monitor. Regarding the child's needs, the social worker testified father had not shown he had the ability to care for the child's medical issues alone and the child primarily required stability, which father had not been able to provide.

We "presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving [it] the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.) Because substantial evidence supports the court's ruling, we will not overturn it. The mere fact father presented other evidence that may have supported a contrary result does not suffice to nullify the court's findings.

Father maintains the child had a close emotional bond with him (*In re S.B.* (2008) 164 Cal.App.4th 289, 300), shown by her calling him "papa," their physical affection, and her attachment to him during visits as displayed by her wanting to go to the restroom with him and trying to sneak into his car. But this does not show the relationship between them was anything more than that of "a friendly visitor or friendly nonparent relative, such as an aunt [or uncle]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468) or that its quality and strength outweighed the benefits of adoption. The beneficial relationship exception must be considered in light of the Legislature's preference for adoption when reunification efforts have failed. The exception does not allow a parent who "failed to reunify with an adoptable child . . . [to] derail an adoption merely by

showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.]" (*Id*. at p. 466.)

We reject both father's contention the court should have ordered legal guardianship rather than terminating his parental rights and maternal relatives' claim the court should have considered the "less 'drastic' alternative" or "'alternative family solution'" of uniting their family with father's. "'Adoption, where possible, is the permanent plan preferred by the Legislature.' [Citation.] If the court finds that a child may not be returned to his . . . parent and is likely to be adopted, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the child . . . . [Citations.]" (*In re Derek W., supra*, 73 Cal.App.4th at p. 826.)

3. Child's Wishes

Section 366.26, subdivision (h)(1) requires the court to "'consider the child's wishes to the extent ascertainable' prior to entering an order terminating parental rights . . . . [Citation.]" (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1591.) Father and maternal relatives assert the court did not comply with this mandate before terminating parental rights. On the contrary, it expressly stated it had "specifically considered the wishes of the child consistent with the child's age . . . ."

Father and the maternal grandparents contend more was required. But they forfeited the issue by failing to raise it in the trial court. (See *In re Amanda D.* (1997) 55 Cal.App.4th 813, 819-820 ["[Father] raised no issue below that the juvenile court should have obtained the minors' testimony regarding their wishes for a permanent plan. [Citation.] He is precluded from presenting it here"].)

In re Laura H. (1992) 8 Cal.App.4th 1689, cited by the maternal relatives, is inapposite. There, the court found the mother had not made a knowing and intelligent waiver of her right to have counsel present at the minor's in-camera testimony on her

preference for placement, stating: "While any constitutional right can be waived, mere acquiescence is not a waiver; a waiver must be knowing and intelligent. [Citation.] Though appellant's attorney did not object to the procedure, there is no showing that appellant was aware of her right to have counsel present at the in-camera hearing. Under these facts, appellant cannot have knowingly and intelligently waived this statutory right or the constitutional right of confrontation which the statute was designed to protect." (*Id*. at pp. 1695-1696, fns. omitted.) These rights were not violated here. Maternal relatives have not identified any procedural right denied to them personally that would excuse the failure to raise the issue in the trial court and they have no standing to assert it on behalf of the child, who did not appeal. (*In re Frank L.* (2000) 81 Cal.App.4th 700, 702-704.)

Even if not forfeited, the issue lacks merit. Maternal relatives contend a de novo standard of review applies. We disagree. Although section 366.26, subdivision (h) requires the court to "consider the wishes of the child and . . . act in the best interests of the child," the question "whether to require a direct statement from the" child personally "is one that is best left to the sound discretion of the trial judge." (*In re Leo M.*, *supra*, 19 Cal.App.4th at p. 1592.) A court need only consider the child's wishes to the extent they are ascertainable and may draw reasonable inferences from evidentiary sources other than the child's testimony. (*In re Amanda D.*, *supra*, 55 Cal.App.4th at p. 820.) Such evidence may include statements made "'on or off the record[and] reports prepared for the hearing . . . .' [Citation.]" (*In re Leo M.*, *supra*, 19 Cal.App.4th at p. 1591, fn. omitted.)

In this case, the court determined the child's preferences to the extent it believed ascertainable from the record. Father argues that because the child was "making progress with her speech," "'speaking more frequently and becoming more understandable,'" she should have been asked about her feelings for him, maternal relatives, and the current caretaker. But those reports also say the child still "has a ways

to go" with her speech and although she appeared "to understand most of what she is told and can follow simple instructions when she feels like it," she had limited verbal skills and was difficult to understand, communicating primarily through sign language or gestures.

Counsel for father and mother confirmed at the permanency hearing the child had "limited verbal skills, and it's really hard to get inside her head to find out how hurtful it would be if she never saw her mama and papa again." Similarly, according to maternal relatives' attorney, the child "doesn't have an extensive vocabulary . . . ." The trial court also observed the child used the phrase, "Your house" in connection with different caretakers. For these reasons, we are not persuaded the child indicated an ability to state a preference to live with father or maternal relatives because she called them "papa" and "Amma" and used the phrase, "Your house." On this record, the court did not abuse its discretion.

Maternal relatives maintain that although the child was non-verbal earlier during the proceedings, "[a]s time went on she became more able to express herself, verbally and with sign language, yet no one, not even her own attorney, attempted to ascertain her wishes." But their failure to provide record references in support of their assertion the child's attorney did not communicate with her forfeits the issue. (*Small v. Superior Court* (2007) 148 Cal.App.4th 222, 229.) Absent evidence to the contrary, we assume the child's attorney complied with her statutory duty to consult the child, to the extent feasible, and that her support for termination was consistent with the absence of a contrary wish by the child. (*In re Jesse B.* (1992) 8 Cal.App.4th 845, 853.) Similarly, although maternal relatives complain the child's bond with them was never determined in a bonding study, they cite no authority mandating such a study. No such requirement exists "in statutory or case law that a court must secure a bonding study as a condition precedent to a termination order." (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339.)

Father quotes the following passage from *In re Julian L.* (1998) 67 Cal.App.4th 204: "'What the court must strive to do is "to explore the minor's feelings regarding his/her biological parents, foster parents and prospective adoptive parents, if any, as well as his/her current living arrangements. . . . [A]n attempt should be made to obtain this information so that the court will have before it some evidence of the minor's feelings from which it can then infer his/her wishes regarding the issue confronting the court."' [Citations.]" (*Id.* at p. 208.) We do not dispute this statement but do not read it as modifying the principle that a juvenile court should consider the child's wishes only to the extent those wishes can be ascertained. For the same reason, *In re Phillip B.* (1979) 92 Cal.App.3d 796, cited by maternal relatives, is not controlling as it does not involve section 366.26, subdivision (h) and holds only that one of the factors to consider before requiring a child to undergo surgery rejected by the parents is "the expressed preferences of the child" (*id.* at p. 802), without addressing the extent to which that can be ascertained.

4. Denial of Maternal Relatives' De Facto Status

Maternal relatives contend the court applied an incorrect standard in denying their request for de facto parent status in late 2009. They argue that had they been granted a hearing, they would have shown "they had continuously had contact with, temporary placement of, and most importantly, a close bond with, the . . . child . . . ." But the court subsequently granted them de facto parent status in mid-2011, which allowed them to fully participate "as parties" at the section 366.26 hearing. They did so, as they were present, represented by counsel, and set forth evidence. (Cal. Rules of Court, rule 5.534(e).) Their failure to identify any prejudice in the denial of the 2009 request defeats their claim and we need not address it on the merits.

5. Caretaker's Background

Maternal relatives assert placement with the caretaker was illegal because she had "a checkered past." But the case on which they rely, *In re Summer H.* (2006) 139 Cal.App.4th 1315, held a trial court's discretion to appoint a legal guardianship is *not* limited by the fact the proposed guardian "had a prior criminal record and no exemption had been granted by the county" (*id*. at p. 1321), and the caretaker in this case *received* the required exception. Moreover, the suitability of a prospective adoptive parent is irrelevant at a section 366.26 hearing at which "the issue [is] whether the minors are likely to be adopted. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650.)

DISPOSITION

The orders are affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.